

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.622 (b),)	MB Docket No. 05-52
Table of Allotments,)	RM-10300
Digital Television Broadcast Stations.)	
Johnstown and Jeannette, Pennsylvania)	

**OPPOSITION OF PITTSBURGH TELEVISION STATION WPCW INC. TO
MOTION FOR STAY**

Nearly four months after filing his petition for reconsideration of the *Report and Order*¹ in this Docket, and more than three months after the effective date of the amendment to the DTV Table of Allotments adopted thereby, Larry Schrecongost asks the Commission retroactively to stay the *Report and Order*.² While Schrecongost claims this belated request is made “out of an abundance of caution,” his actions in fact reflect a deliberately dilatory approach to this matter – an approach so prejudicial to the interests of Pittsburgh Television as to in itself debar him from equitable relief.

¹ See, *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Johnstown and Jeanette, Pennsylvania)*, MB Docket No. 05-52, 21 FCC Rcd 1350 (released February 15, 2006) (the “*Report and Order*”).

² Schrecongost is the licensee of Class A television station WLLS-CA, Indiana, Pennsylvania. Pittsburgh Television Station WPCW Inc. (“Pittsburgh Television”) is the licensee of WPCW-DT, Jeannette, Pennsylvania. Schrecongost claims that the Commission’s amendment of the DTV Table of Allotments to specify Channel 49 as WPCW’s digital frequency -- an amendment that will have the effect of displacing WLLS on its current channel – violates the interference protection to which it is entitled under the Community Broadcasters Protection Act.

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To review the history yet again: The *Report and Order* was published in the Federal Register on February 22, 2006,³ and specified that the amendment to the DTV Table would become effective on April 3, 2006. Schrecongost knew or should have known that, in the absence of the filing of a motion for a stay, Pittsburgh Television could file an application for a construction permit to build the digital facilities of WPCW at any time after that date.⁴ Nonetheless, Schrecongost chose not to request a stay when he filed his petition for reconsideration of the *Report and Order* on March 24, 2006. Instead, after Pittsburgh Television filed an application for a permit to construct the digital facilities that were authorized by the then-effective DTV Table of Allotments, Schrecongost filed a petition to deny, which *still* made no mention of a stay. After waiting another week, Schrecongost apparently decided, on June 8, 2006, that the time was finally ripe to demand that the Commission stay “any action on the above-referenced application until such time as Commission action with respect to the *Report and Order*

³ 71 Fed. Reg. 8986-87.

⁴ Thus Section 1.429 (k) of the Commission’s rules provides:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay *the effective date* of a rule pending a decision on a petition for reconsideration.

47 CFR § 1.429 (k) (emphasis added.)

... becomes final.”⁵ Schrecongost gave no explanation for the belated nature of this request, and has offered none to date.

Pittsburgh Television filed an opposition on June 21, 2006. In that filing, it noted that Schrecongost’s actions were directly in conflict with the policy goals enunciated by the Commission in eliminating the automatic stay of a channel-change amendment to the Table of Allotments that could once be invoked by the mere filing of a petition for reconsideration – namely, to avoid “delay[s] in the commencement of construction and the provision of expanded service to the public.”⁶ Pittsburgh Television also demonstrated that Schrecongost could not prevail under any of the four factors weighed by the FCC in considering whether a stay of a Commission decision is warranted.

A copy of our opposition is attached as Exhibit A. We will not rehearse once more the arguments made in that filing. One point, however, merits reemphasis.

Congress has set February 17, 2009 as the date for the final digital transition. After that date, if WPCW has no digital signal, it will have no signal at all. Notwithstanding this reality, Schrecongost waited for months before first suggesting that Pittsburgh Television’s construction permit application be put on indefinite hold until his ability to litigate this matter has been fully exhausted -- that is, until the Media Bureau has written its decision, the full Commission has disposed of the Application for Review that will inevitably follow, Schrecongost’s appeal to the D.C. Circuit has been briefed

⁵ See, *Motion for Stay, In the Matter of Application of Pittsburgh Television Station WPCW Inc.*, BPCDT-20060510AAI (filed June 8, 2006) at 1.

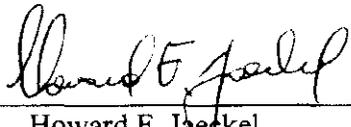
⁶ *Report and Order*, MM Docket No. 95-110, *Amendment of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501, 9504 (1996).

and argued, and a judicial opinion has been written. These circumstances would argue powerfully against granting a stay in any case; given Schrecongost's unexplained – and therefore presumptively deliberate – wasting of time, they should in themselves be dispositive.

Schrecongost has not requested the one form of relief to which he may rightfully be entitled – an expedited decision on the merits. Pittsburgh Television *does* respectfully request expedited consideration of Schrecongost's petition for reconsideration, along with the immediate denial of his motion for a stay.

Respectfully submitted,

**PITTSBURGH TELEVISION STATION
WPCW INC.**

By: 
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July 26, 2006

EXHIBIT A

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of Application of)	
)	
Pittsburgh Television Station WPCW Inc.)	BPCDT-20060510AAI
WCPW-DT, Jeannette, Pennsylvania)	
)	
For Minor Change in Licensed Facility)	

**CONSOLIDATED OPPOSITION OF PITTSBURGH TELEVISION STATION
WPCW INC. TO MOTION FOR STAY; OPPOSITION TO AND MOTION TO
DISMISS PETITION TO DENY**

Howard F. Jaeckel

51 West 52nd Street
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June 21, 2006

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SUMMARY

Pittsburgh Television Station WPCW Inc. ("Pittsburgh Television"), licensee of WPCW-DT, Jeannette, Pennsylvania ("Station"), hereby respectfully submits its consolidated opposition to successive filings made by Larry L. Schrecongost ("Schrecongost" or "Petitioner"), licensee of Class A television station WLLS-CA, Indiana, Pennsylvania, seeking to delay the construction of the authorized digital facilities of WPCW.

The substance of all of Schrecongost's filings is the same. He objects to the Commission's amendment of the DTV Table of Allotments to specify Channel 49 as WPCW's digital frequency -- an amendment that will have the effect of displacing WLLS on its current channel, but which the Commission found will enable WPCW-DT to provide maximized service to its community of license. That amendment to the DTV Table was announced in a *Report and Order* released on February 15, 2006, which became effective on April 3, 2006. Schrecongost filed a timely petition for reconsideration of the *Report and Order* on March 24, 2006, but did *not* request a stay of the effective date of the amendment to the DTV Table.

Schrecongost's "petition to deny" the application for construction permit must be dismissed, since he has clearly failed to set forth a *prima facie* reason why the application should not be granted. In the absence of a timely filed motion for a stay of the amendment of the Table of Allotments, the Bureau's responsibility to process an application that conforms to the existing Table is clear. It was precisely to allow such ordinary-course processing that the Commission repealed the automatic stay of channel-change amendments to the Table of Allotments that once could be invoked merely by the

filing a reconsideration petition. For similar reasons, Schrecongost's "motion for stay" must also be dismissed.

Even if Schrecongost's request for a stay were not fatally untimely, such relief would plainly not be warranted on the facts of this case. In order to meet the "heavy burden" faced by stay applicants, Schrecongost would have to demonstrate that: (1) there is a substantial likelihood that he will succeed on the merits; (2) he will suffer irreparable injury if the stay is not granted; (3) Pittsburgh Television will not suffer harm from grant of a stay; and (4) the stay will be in the public interest. Schrecongost cannot meet any of these criteria.

Finally, Petitioner asserts that the instant application for construction permit cannot be granted because it filed its ultimately successful petition for rulemaking seeking a change in its DTV allotment (with supporting engineering data) on August 25, 1999, rather than having filed a *pro forma* "checklist" application by November 1, 1999. This contention flies in the face of rationality, and the way in which the Commission has previously treated such situations. Pittsburgh Television has diligently pursued the objective of constructing WPCW's digital facilities; the delays it has experienced are due to circumstances beyond its control -- primarily, administrative error by the Commission. Petitioner's suggestion that the appropriate course for the Commission now is to deny Pittsburgh Television the use of the channel that the FCC has found will best serve the public by maximizing DTV service -- or to cancel its digital authorization altogether -- is manifestly inconsistent with the Commission's prior treatment of such situations, with fairness, and with common sense.

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WCPW-DT, Jeannette, Pennsylvania)
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**CONSOLIDATED OPPOSITION OF PITTSBURGH TELEVISION STATION
WPCW INC. TO MOTION FOR STAY; OPPOSITION TO AND MOTION TO
DISMISS PETITION TO DENY**

PRELIMINARY STATEMENT

Pittsburgh Television Station WPCW Inc. ("Pittsburgh Television"), licensee of WPCW-DT, Jeannette, Pennsylvania ("Station"), hereby respectfully submits its consolidated opposition to successive filings made by Larry L. Schrecongost ("Schrecongost" or "Petitioner"), licensee of Class A television station WLLS-CA, Indiana, Pennsylvania, seeking to delay the construction of the authorized digital facilities of WPCW.¹

¹ At the time the *Report and Order* was issued, WPCW's call letters were WNPA. For purposes of convenience, however, the station will be referred to herein as WPCW. The name of the Station's licensee has also changed to Pittsburgh Television Station WPCW Inc., and will be referred to throughout as "Pittsburgh Television."

We also note that, on December 31, 2005, Viacom Inc. ("Old Viacom"), the ultimate owner of licensee Pittsburgh Television, effected a corporate reorganization in which its name was changed to CBS Corporation, and certain other businesses owned by Old Viacom were spun off into an independent, publicly traded corporation, which was given the Viacom name ("New Viacom").

The substance of all of Schrecongost's filings is the same. He objects to the Commission's amendment of the DTV Table of Allotments to specify Channel 49 as WPCW's digital frequency -- an amendment that will have the effect of displacing WLLS on its current channel, but which the Commission found will enable WPCW-DT to provide maximized service to its community of license. That amendment to the DTV Table was announced in a *Report and Order* released on February 15, 2006,² which became effective on April 3, 2006. Schrecongost filed a timely petition for reconsideration of the *Report and Order* on March 24, 2006, but did *not* request a stay of the effective date of the amendment to the DTV Table.

Schrecongost has now made two additional filings, on June 1 and June 8, 2006, respectively: (1) a petition to deny the above-captioned application for construction permit to build the digital facilities of WPCW authorized by the amendment of the DTV Table and (2) a "motion for stay" of action on that application.

Schrecongost's duplicative filings constitute an improper effort to relitigate the outcome of a rulemaking proceeding in the context of a license application. Worse, the timing of those filings, made in disregard of orderly procedure and the FCC's rules, seems intended to achieve maximum dilatory effect at the expense of the efficient resolution of proceedings pending before the Commission and the expeditious initiation of digital service to the public.

The Commission should not tolerate such gamesmanship. Schrecongost's "petition to deny" the application for construction permit must be dismissed, since he has

² See, *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Johnstown and Jeanette, Pennsylvania)*, MB Docket No. 05-52, 21 FCC Rcd 1350 (released February 15, 2006) (the "*Report and Order*").

clearly failed to set forth a *prima facie* reason why the application should not be granted. In the absence of a timely filed motion for a stay of the amendment of the Table of Allotments, the Bureau's responsibility to process an application that conforms to the existing Table is clear. It was precisely to allow such ordinary-course processing that the Commission repealed the automatic stay of channel-change amendments to the Table of Allotments that once could be invoked merely by the filing a reconsideration petition.

Schrecongost cannot escape the consequences of having failed to make a timely motion for stay of the *Report and Order* by asking -- months later -- for a "stay" of action on an application that in all respects conforms to the Commission's rules and the DTV Table as it now exists. Having failed to move for a stay when he filed his petition for reconsideration of the *Report and Order* -- as he readily could have done -- Schrecongost has left this matter in a posture in which there is quite simply nothing for the Commission to stay. What Schrecongost seeks is not a stay, but just *delay*. The Commission should not accommodate him.

This is not a matter of mere procedural nicety. As detailed below, Schrecongost waited for two and a half months after its petition for reconsideration of the *Report and Order* was due before filing a purported motion for a stay. To grant a stay under these circumstances would be completely at odds with the Commission's express purpose in eliminating the automatic stay for which its rules formerly provided -- that is, to prevent unjustified "delay in the commencement of construction and the provision of expanded service to the public."³

³ *Report and Order*, MM Docket No. 95-110, *Amendment of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501, 9504 (1996) (hereafter "*Automatic Stays*").

Even had Schrecongost availed himself of the remedy clearly prescribed by the Commission's rules and policies by filing a motion for stay of the *Report and Order* along with his petition for reconsideration, a stay would not be warranted here. Petitioner cannot prevail under any of the four factors weighed by the Commission in considering the appropriateness of such relief.

First, Petitioner has *no* likelihood of success on the merits. In establishing the Class A television service,⁴ the Commission made crystal clear that, where a party holding an initial DTV authorization has filed a channel-change petition, that petition has priority over a subsequently filed application for Class A status. There is no dispute that both Pittsburgh Television's initial rulemaking petition for a change in WPCW's digital allotment, and its amended petition seeking maximization of the Station's facilities, long preceded WLLS's certification of eligibility for Class A status and its subsequent application for such designation.

Second, Petitioner is not threatened with irreparable harm. Unless he declines to avail himself of the Commission's liberal displacement procedures, WLLS will not have to go off the air; as noted in the *Report and Order*, there are at least two channels to which WLLS could move. Indeed, Pittsburgh Television has shown that there are engineering solutions available to Petitioner that would actually *increase* WLLS's interference free service area over that of the station's current operation. And while effecting such a move would cost Petitioner money, the necessity of making monetary

⁴ *Report and Order, In the Matter of Establishment of a Class A Television Service*, MM Docket No. 00-10, 15 FCC Rcd 6355, 6377 (2000) ("*Class A Report and Order*").

expenditures has never been considered “irreparable harm” by the Commission or the courts.

Nor is it true that Pittsburgh Television would not be harmed by the grant of a stay. As the record reflects, since August 1999, Pittsburgh Television has diligently sought to substitute Channel 49 for Channel 30 as WPCW’s DTV channel, in order to make possible significantly improved service by the station to the public. Almost five years ago, the Commission found that the proposed amendment to the DTV Table “warrant[ed] consideration,” and issued a *Notice of Proposed Rulemaking* to effectuate the channel change.⁵ Through no fault of Pittsburgh Television’s, that rulemaking proceeding was invalidated by a government administrative error, and was not reinstated until February 17, 2005.⁶ With the final date for the DTV transition now less than three years away -- less than half the time the above rulemaking proceeding has already been pending -- and with Schrecongost indicating an intent to seek judicial review if its petition for reconsideration is rejected by the Commission, it is idle to suggest that Pittsburgh Television will not be harmed by a stay preventing the construction of WPCW’s digital facilities until Schrecongost’s final appeal has been exhausted.

Finally, the public interest would most certainly not be served by the stay sought by Petitioner. The Commission has repeatedly emphasized the importance of a rapid roll

⁵ See, *Notice of Proposed Rulemaking, In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Johnstown and Jeannette, Pennsylvania)*, 16 FCC Rcd 18746 (2001).

⁶ See, *Notice of Proposed Rulemaking, In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations. (Johnstown and Jeannette, Pennsylvania)*, 20 FCC Rcd 3456 (2005).

out of digital television. Delaying the availability of the high definition programming of a national television network -- with which WPCW is affiliated -- to viewers in the Pittsburgh market cannot be in the public interest. Certainly the importance of expediting the provision of digital service by a full power, network-affiliated station outweighs any potential loss of service to a comparative handful of viewers from a low power station that presents little in the way of non-entertainment or local programming. This is especially the case when there need be no loss of service at all if Petitioner will move WLLS to one of several alternate channels on which it might operate.

PROCEDURAL POSTURE

On February 15, 2006, the Commission released its *Report and Order* amending the DTV Table of Allotments to substitute Channel 49 for Channel 30 as the digital frequency of WPCW, and reallocated DTV channel 49 from Johnstown, Pennsylvania to Jeannette.⁷ That amendment had been opposed by Schrecongost in comments filed in response to the Commission's *Notice of Proposed Rulemaking* in the proceeding, in which Schrecongost asserted that changing WPCW's digital allotment to Channel 49 would violate the interference protection to which WLLS was allegedly entitled under the Community Broadcasters Protection Act. The Media Bureau rejected that contention, finding that "proposals [to maximize service] by initial digital licensees are not required to protect Class A facilities."

The *Report and Order* was published in the Federal Register on February 22, 2006,⁸ and specified that the amendment to the DTV Table would become effective on

⁷ *Report and Order, supra*, 21 FCC Rcd 1350.

⁸ 71 Fed. Reg. 8986-87.

April 3, 2006. Petitioner knew or should have known that, in the absence of the filing of a motion stay, Pittsburgh Television could file an application for construction permit to build the digital facilities of WPCW at any time after that date. Thus Section 1.429 (k) of the Commission's rules provides:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration.⁹

On March 24, 2006, Schrecongost filed a timely petition for reconsideration, making virtually identical arguments as those set forth in his rulemaking comments. But he did not request a stay of the date on which the amendment of the DTV Table was to become effective. Accordingly, Pittsburgh Television station filed an application for construction permit on May 10, 2006 that was fully consistent with the new DTV Table.

On June 1, Schrecongost filed a petition to deny that application, but still made no mention of requesting a stay. A full week later, on June 8 – close to four months after initial release of the *Report and Order* – Schrecongost filed a motion to stay “any action on the above-referenced application until such time as Commission action with respect to the *Report and Order* . . . becomes final.”¹⁰

⁹ 47 CFR § 1.429 (k).

¹⁰ Motion for Stay at 1.

ARGUMENT

I. THE PETITION TO DENY AND MOTION TO STAY FAIL TO STATE A CLAIM, ARE CONTRARY TO THE COMMISSION'S RULES, AND MUST BE DISMISSED

A. The Petition to Deny Does Not State *Prima Facie* Grounds for Denial of the Application.

As noted above, the Commission's rules state that "the filing of a petition for reconsideration shall not . . . operate in any manner to stay or postpone" the effectiveness of the Commission's action in a rulemaking proceeding.¹¹ The preclusive effect of this provision on Schrecongost's petition is clear. Indeed, the point is beyond argument, since the Commission has acted expressly to ensure that this will be the effect of the rule in the very situation presented by this case.

Prior to 1996, the Commission's rules provided for an automatic stay, upon the filing of a petition for reconsideration, of amendments to the FM or TV Table of Allotments that modified an authorization to specify operation on a different channel – precisely the action taken by the *Report and Order* with respect to WPCW's digital authorization. But the Commission has long since eliminated this provision of its rules, finding that "the automatic stay . . . has regularly resulted in delay in the commencement of construction and the provision of expanded service to the public."¹²

Thus the Commission found that the automatic stay had encouraged "many apparently meritless petitions . . . [that] have imposed a substantial and unwarranted cost on local communities, individual broadcasters, and the Commission itself." Expanding

¹¹ 47 CFR § 1.429 (k).

¹² *Automatic Stays. supra*, 11 FCC Rcd at 9504.

on this conclusion, the Commission explained that the provision resulted in “significant populations [being] denied the advantages of improved service for long periods of time, . . . constrain[ed] broadcasters' flexibility . . . [and] . . . needlessly divert[ed] resources that otherwise would be available to the Commission for the performance of other necessary functions.”¹³

The Commission noted that “that permittees and licensees affected by allotment changes who would no longer be entitled to the protection of an automatic stay would nonetheless continue to have substantial procedural protections.”¹⁴ Among other things, the Commission observed, it “retain[ed] the authority . . . to impose a stay in individual cases.”¹⁵ Indeed, the Commission said it would be “particularly cognizant of requests for stay filed by any party whose authorization would be changed involuntarily,”¹⁶ while at the same time noting that such a party would face a “high burden” in demonstrating that a stay was warranted.¹⁷

Schrecongost could easily have moved for a stay of the amendment of the DTV Table at the same time he filed his petition for reconsideration of the *Report and Order*.

¹³ *Id.* at 9505.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 9505-06.

¹⁷ *Id.* at 9506, n.21. The Commission also stated that, in order to minimize the risk of imposing significant costs on licensees or permittees required to change channels as a result of an allotment change, it would “make every effort to reach and promptly decide any petition for reconsideration filed against the underlying allotment action by such a party.” The Commission also emphasized that elimination of the automatic stay provision would “not prejudice final resolution of any challenges” to such action. *Id.* at 9505-06.

Instead, in the plain hope of gaining a *de facto* stay through the delays in application processing that are generally incident to the filing of a petition to deny, Schrecongost has filed a petition arguing that the Commission should deny the application on the ground that the DTV Table was improperly amended. But the Commission's rules make unmistakably clear that, absent a stay, such amendments will be considered effective, notwithstanding the pendency of a petition for reconsideration.

Thus the amendment to the DTV Table adopted by the *Report and Order* is currently effective. Schrecongost's strenuous arguments that it really shouldn't be fail to state *prima facie* grounds for denying the application.

The Commission has concluded, based on long experience, that reconsideration petitions in these circumstances are overwhelmingly likely to be denied.¹⁸ It has therefore made a judgment that the public interest will best be served by allowing an applicant to initiate broadcast service, at its own risk, absent a persuasive showing that a stay of an order granting a channel change is justified. The Commission's policy judgment, applied to the facts of this case, requires that Schrecongost's petition be dismissed without substantive consideration.

B. Petitioner's Request that the Commission "Stay Action on the Application" Has No Basis in the Commission's Rules and Must Not be Allowed to Substitute for a Timely Motion for Stay of the Report and Order.

As noted above, Section 1.429(k) of the Commission's rules states the filing of a petition for reconsideration will not postpone the effectiveness of a rule adopted by the FCC, but that "upon good cause shown, the Commission will stay *the effective date* of a rule pending a decision on a petition for reconsideration." (Emphasis added).

¹⁸ *Id.* at 9502.

Schrecongost did not file a motion for stay with his reconsideration petition; rather, he waited until *after* the effective date of the amendment of the DTV Table, and after Pittsburgh Television had filed its application for construction permit, to file his “motion for stay.” The upshot is that Schrecongost first asked for a “stay of action” on Pittsburgh Television’s application two and a half months after his petition for reconsideration of the *Report and Order* was due, and long after the amendment to the DTV Table became effective.

For the Commission to entertain this grossly belated request would be totally at odds with the rationale underlying its elimination of the automatic stay rule. By ignoring the plain import of the Commission’s rules as to *what* is to be stayed (i.e., the effective date of amendment of the DTV Table), Schrecongost has deprived the Commission of an opportunity to consider in a timely manner his claim that the circumstances here, unlike those in the typical case, warrant delaying WPCW’s initiation of digital service during the lengthy process of administrative and judicial review. Having intentionally or negligently introduced an *additional* two months delay into the process, Schrecongost is ill-positioned to invoke such extraordinary relief.

The time for Petitioner to request a stay is past. Pittsburgh Television is entitled to build WPCW’s digital facilities, at its own risk, without the further delay that substantive consideration of Petitioner’s stay arguments would involve -- consideration that the Commission might have been giving those arguments over the past two and a half months were it not for Schrecongost’s dilatory tactics.

In eliminating the automatic stay provision formerly applicable to cases such as this, the Commission emphasized that it would seek to “minimize the risk of imposing

significant costs on licensees . . . required to change channels as a result of an allotment change . . . [by] . . . promptly decid[ing] any petition for reconsideration” of the change.¹⁹ Having failed to timely request a stay, Schrecongost’s remedy is to seek expedited action on his petition for reconsideration of the *Report and Order*. Pittsburgh Television will fully support him in such a request.

II. IN ANY EVENT, A STAY IS NOT WARRANTED BY THE FACTS OF THIS CASE.

Even if Schrecongost’s request for a stay were not fatally untimely, such relief would plainly not be warranted on the facts of this case. In order to meet the “heavy burden” faced by stay applicants, Schrecongost would have to demonstrate that: (1) there is a substantial likelihood that he will succeed on the merits; (2) he will suffer irreparable injury if the stay is not granted; (3) Pittsburgh Television will not suffer harm from grant of a stay; and (4) the stay will be in the public interest.²⁰ Schrecongost cannot meet any of these criteria.

A. There is No Likelihood that Schrecongost Will Succeed on the Merits.

In his latest filings, Petitioner rehearses again the sum and substance of his case: that in changing WPCW’s digital allotment to Channel 49, the Commission violated the interference protection to WLLS mandated by the Community Broadcasters Protection Act (“CBPA” or the “Act”). One need not go beyond the face of the Commission’s

¹⁹ *Id.* at 9505.

²⁰ See, e.g., *LocalOne Texas, Ltd.*, 20 FCC Rcd 13521 (Media Bureau 2005); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958).

Report and Order establishing the Class A television service ²¹ to demonstrate the fallacy of this contention.

Schrecongost asserts that Pittsburgh Television's rulemaking petition for a change in WPCW's digital allotment (the "Rulemaking Petition") was entitled to priority over WLLS only if it properly could be viewed as a timely-filed "maximization" application under the Act, the grant of which was necessary to solve "technical problems." As Pittsburgh Television has shown in its *Opposition to Petition for Reconsideration* ("*Reconsideration Opposition*," attached hereto as Exhibit A),²² treating the Rulemaking Petition as a timely filed maximization application is in complete harmony with the Commission's intent that "maximization" should be given a "broad interpretation . . . consistent with the CBPA's emphasis on protecting the digital transition."²³ Further, Petitioner's repeated insistence that the CBPA affords priority to a timely-filed DTV maximization application only if its grant is necessary for "technical" reasons willfully ignores the Commission's express statement that Class A stations are required to protect all DTV stations seeking to maximize their facilities "*regardless of the existence of "technical problems."*"²⁴

²¹ *Class A Report and Order, supra*, 15 FCC Rcd 6355 (2000).

²² *Reconsideration Opposition* at 9-12.

²³ *Class A Report and Order, supra*, 15 FCC Rcd at 6377.

²⁴ *Id.* ("Despite the reference in section (f) (1) (D) to technical problems, we continue to believe it is more consistent with the statutory schemes both for Class A LPTV service and for digital full-service broadcasting to require Class A applicants to protect all stations seeking to replicate or maximize DTV power . . . *regardless of the existence of "technical problems."*) (emphasis added).

But whether or not Pittsburgh Television's request for a change in WPCW's digital frequency is technically viewed as a maximization application is ultimately irrelevant. That is because the *Class A Report and Order* makes unmistakably clear that a DTV rulemaking petition filed by a party already holding a DTV authorization, and pending at the time of the adoption of the CBPA, is entitled to priority over a Class A station.

Thus, in the *Class A Report and Order*, the Commission set forth the standards it would apply when a petition for a change in the DTV Table of Allotments conflicted with a Class A station or applicant. The Commission stated that “[i]n a *new* DTV allotment rule making, we will require protection of Class A stations.” (Emphasis added). The Commission then immediately explained what it would consider a “new” DTV allotment rulemaking: “We will not require Class A applicants to protect pending allotment proposals from *new DTV entrants, that is, petitioners who do not already have a DTV authorization.*”²⁵ The plain meaning of the above is that the Commission *will* require the protection of already-pending channel change petitions filed by parties who *do* have a DTV authorization.²⁶

²⁵ *Id.* at 6376.

²⁶ It cannot be contended that, since WPCW-DT lacked a construction permit for specified facilities, it did not hold “a DTV authorization.” In the *Fifth Report and Order*, the Commission explained its licensing scheme for DTV:

The statute directs us to limit initial eligibility for DTV licenses to persons that, as of the date of the issuance of the licenses, are licensed to operate a television broadcast station or hold a permit to construct such a station, or both. As the statute contemplates, we hereby issue a *license* to all eligible licensees and permittees . . . We conclude that it more effectively effectuates the congressional scheme to

It is absolutely clear, therefore, that as licensee of WPCW-DT, Pittsburgh Television was not “a new DTV entrant,” whose pending allotment proposals a Class A station would not be required to protect; rather, it was the holder of a DTV authorization, whose pending channel-change petitions would have priority over Class A stations.²⁷

It is no wonder that Schrecongost’s “petition to deny” and “motion to stay” make no reference to the above-quoted language, notwithstanding Pittsburgh Television’s repeated citations of it.²⁸ Schrecongost’s reticence is an implicit recognition that the Commission’s statement, without more, is dispositive of his contentions. Those arguments are utterly lacking in merit, and stand no chance of success on the merits.

B. Petitioner Will Not Suffer Irreparable Harm Absent a Stay.

In its *Report and Order*, the Commission noted that “[a]lthough WLLS-CA will be displaced on channel 49, it need not go off the air” since there are at least two alternate channels to which it could move in order to continue broadcasting.²⁹ Indeed, as Pittsburgh Television has shown, there are engineering solutions available to Petitioner that would actually *increase* WLLS’s interference free service area over that of the

implement the statute through a three-phased process, *with the first phase consisting of the initial DTV license*, rather than through our conventional procedure.

Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 12 FCC Rcd 12809, 12838 (1997) (“*Fifth Report and Order*”) (emphasis added).

²⁷ As we have shown, Pittsburgh Television Station’s rulemaking petition for a change in its digital allotment was filed three months before Petitioner sought Class A designation for WLLS.

²⁸ See, e.g., *Reconsideration Opposition* at 12-13.

²⁹ *Report and Order*, *supra*, 21 FCC Rcd 1350.

station's current operation.³⁰

The fact that effort and the expenditure of money would be required for Petitioner to avail himself of these potential solutions does not entitle him to a stay. It is well-settled that "mere injuries, however substantial, in terms of money, time and energy expended do not constitute irreparable harm."³¹

Of particular relevance here, the Commission has expressly held that the potential displacement of a low power station does not constitute the kind of irreparable injury that warrants a stay. Thus, in *LocalOne Texas, Ltd.*,³² the Media Bureau declined to stay a ruling by the Video Division rescinding the Class A designation of an LPTV station on the ground that it had not met the requirements for Class A status. The Bureau stated:

While WFUN-LP is not entitled to primary status as a Class A television station absent a stay, LocalOne presents no information indicating that it cannot continue to operate as a low power television station absent a stay. *In the event it is subsequently displaced, it may apply for displacement relief and move to another channel at its present location or a different location.*³³

The Media Bureau's conclusion in *LocalOne Texas* that the threat of future displacement of an LPTV station did not constitute "irreparable injury" was reached despite the fact that, in *LocalOne*, there had been no finding that a channel actually existed to which the low power station could move. If irreparable harm was not shown

³⁰ See, *Reconsideration Opposition* at Exhibit A, Engineering Statement of Joseph M. Davis.

³¹ *LocalOne Texas, Ltd.*, 20 FCC Rcd 13521 (Media Bureau 2005) (internal quotations deleted).

³² *Id.*

³³ *Id.* (emphasis added).